No.

Supreme Court, U. S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

THE STATE OF ILLINOIS,

Petitioner,

vs.

DAVID BISHOP,

79-1008

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

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Printed by Authority of the State of Illinois—12-79-40

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Manner Of Raising The Federal Constitutional Question	4
Reasons For Allowance Of Writ:	
I. THE WARRANT HEREIN PARTICULARLY DESCRIBED THE THINGS TO BE SEIZED, WITHIN THE MEANING OF THE FOURTH AMENDMENT, WHERE IT COMMANDED THE SEIZURE OF EVIDENCE OF THE OFFENSES OF POSSESSION OF CANNABIS AND CONTROLLED SUBSTANCES, AND PARAPHERNALIA, AND WHERE THE COMPLAINT HAD DESCRIBED THE SPECIFIC CONTRABAND OBSERVED BY THE INFORMANT	5
II. EXCLUSION OF EVIDENCE SEIZED ON PROBABLE CAUSE BUT PURSUANT TO AN INVALID SEARCH WARRANT IS UNJUSTIFIABLE, WHERE THE ALLEGED CONSTITUTIONAL VIOLATION CONSISTED OF JUDICIAL ERROR RATHER THAN ANY POLICE MISCONDUCT, SINCE EXCLUSION IN SUCH A CASE WOULD HAVE NO DETERRENT EFFECT	8
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	7a
APPENDIX C	9a

CITATIONS

Cases	Page
Alderman v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1967)	9
Andreson v. *Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)	5, 6
Elkins v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444 4 L.Ed.2d 1669 (1960)	9
James v. *United States*, 416 F.2d 467 (5th Cir. 1969)	6
Mapp v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)	8
People v. *Henry*, 482 P.2d 357, 361 (Colo. 1971)	6
People v. *Redmond*, 43 Ill. App.3d 682, 357 N.E.2d 204, 205, 2 Ill. Dec. 227, 228 (1st Dist. 1976)	7
People v. *Schmidt*, 172 Colo. 285, 473 P.2d 698, 700 (Colo. 1970)	6
People v. *Walker*, 250 Cal. App.2d 214, 58 Cal. Rptr. 495, 499 (2nd Dist., 1967)	6
State v. *Christow*, 147 N.J. Super. 258, 371 A.2d 108, 109 (1977)	7
State v. *Clark*, 281 N.W.2d 412, 416 (S.D. 1979)	7
State v. *Quintana*, 87 N.M. 414, 534 P.2d 1126, 1130 (1975)	6
Stone v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 3051-52, 49 L.Ed.2d 1067 (1976)	9, 10
United States v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)	8, 9
United States v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 744, 13 L.Ed.2d 684 (1965)	8

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THE STATE OF ILLINOIS,

Petitioner,

vs.

DAVID BISHOP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

The State of Illinois respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fifth Judicial District, affirming the order of the Circuit Court of Saline County, Illinois, suppressing certain evidence seized pursuant to a search warrant.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, is reported at 71 Ill. App. 3d 52, 388 N.E.2d 1144, 27 Ill. Dec. 181 (5th Dist. 1979), and is included herein as Appendix A.

The order of the Supreme Court of Illinois denying the People's petition for leave to appeal was entered October 1, 1979. This order was not reported. A copy of the letter of notification is included herein as Appendix B.

JURISDICTION

The judgment of the Appellate Court was entered on April 19, 1979. A timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 1, 1979. This petition is timely under Rule 22, where it is filed within 90 days of the final order of the Supreme Court of Illinois denying leave to appeal.

This Court has jurisdiction under 28 U.S.C. § 1257 (3) where evidence seized pursuant to a search warrant was suppressed, based on respondent's assertion of a right under the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether a search warrant "particularly describes" the things to be seized, where it commands the seizure of evidence of the offenses of possession of cannabis and controlled substances, (which are contraband under Illinois law) and paraphernalia.

II. Whether the Fourth Amendment requires exclusion of evidence on the basis of a defect in the language of the search warrant, where the alleged defect was the result of judicial error and bore no relation to any identifiable police misconduct.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 9, 1976, a search warrant was issued by a judge of the Circuit Court of Saline County, Illinois, on the complaint and affidavit of Jon L. Sandusky, an agent of the Illinois Bureau of Investigation. (The Complaint and Warrant are contained in Appendix C.) The search warrant commanded peace officers to search the defendant's home and motor vehicles, and commanded that:

> . . . the following instrument, articles and things which have been used in the commission of, or which constitute

evidence of, the offense of Possession of Cannabis, Possession of Controlled Substance and paraphernalia, be seized therefrom:

The colon was followed by a blank in which nothing was written.

Pursuant to the warrant, police officers searched respondent's residence, and seized a large quantity of marijuana, hashish, and powder believed to be controlled substance, as well as other items not pertinent to this cause.

Respondent subsequently moved to quash the warrant and suppress evidence seized pursuant to it, alleging, *inter alia*, that the warrant did not particularly describe the property to be seized. Following a hearing, the trial court found that as a matter of law the search warrant was defective, for failure to specify the items to be seized. Accordingly, the trial court ordered the warrant to be quashed and evidence seized pursuant to it to be suppressed.

MANNER OF RAISING THE FEDERAL CONSTITUTIONAL QUESTION

The defendant raised the issue of the constitutional adequacy of the search warrant in his motion to suppress evidence in the trial court, alleging *inter alia*, that admission of evidence seized pursuant to the allegedly defective search warrant violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. This was also the finding of the trial court.

In their appeal to the Appellate Court of Illinois, Fifth Judicial District, the People contended that the search warrant did describe the items to be seized with sufficient particularity to satisfy Federal constitutional requirements, and that the warrant ought not to be quashed and evidence seized pursuant to it to be suppressed due to any technical defects.

The Appellate Court ruled that the search warrant was, in effect, a "general warrant," prohibited by the Fourth and Fourteenth Amendments to the United States Constitution. *People* v. *Bishop*, 71 Ill.App.3d 52, 388 N.E.2d 1144, 1146-7, 27 Ill. Dec. 181, 183-4 (5th Dist. 1979). The court, accordingly, affirmed the trial court's order quashing the warrant and suppressing evidence seized pursuant to it.

The People's petition for leave to appeal to the Illinois Supreme Court was denied.

REASONS FOR ALLOWANCE OF WRIT

I. THE WARRANT HEREIN PARTICULARLY DESCRIBED THE THINGS TO BE SEIZED, WITHIN THE MEANING OF THE FOURTH AMENDMENT, WHERE IT COMMANDED THE SEIZURE OF EVIDENCE OF THE OFFENSES OF POSSESSION OF CANNABIS AND CONTROLLED SUBSTANCES, AND PARAPHERNALIA, AND WHERE THE COMPLAINT HAD DESCRIBED THE SPECIFIC CONTRABAND OBSERVED BY THE INFORMANT.

Review of this case by the Supreme Court is warranted where the Illinois Appellate Court, Fifth District, interpreted the requirement of the Fourth Amendment that a search warrant "particularly describe" the items to be seized, in a manner inconsistent with this Court's decision in *Andresen* v. *Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), and with decisions of the courts of numerous other jurisdictions interpreting the same constitutional provision. The Appellate Court held insufficient the command of the warrant to seize evidence of the offenses of cannabis and controlled substances, and paraphernalia.

In *Andresen*, however, this Court found constitutionally sufficient search warrants commanding seizure of various specifically described items, "together with other fruits, instru-

mentalities and evidence of crime at this [time] unknown." 96 S.Ct. at 2748. This Court held from the context it was clear that the term "crime" referred only to the crime of false pretenses with respect to the sale of a certain lot.

The instant cause now before this Court therefore represents even a stronger case for upholding the search warrant, than the one this Court considered in *Andresen*. The instant warrant specifically named the offenses under investigation, without requiring reference to the context, as in *Andresen*. Moreover, the offenses under investigation, namely possession of drugs which are contraband under Illinois law, by their very nature defined and limited the evidence to be sought and seized, unlike *Andresen* which authorized a search among the defendant's private papers for materials which might, or might not, have related to the circumstances surrounding a particular land transaction.

The decision of the Appellate Court is also in apparent conflict with decisions of numerous other jurisdictions holding that a lesser standard of particularity of description is required in search warrants involving contraband or inherently illegal property. Accordingly, courts have upheld the validity of search warrants commanding the seizure of "gambling paraphernalia" (*James* v. *United States*, 416 F.2d 467 (5th Cir. 1969)), "marijuana, dangerous drugs, stimulant drugs and hallucinogenics" (*People* v. *Schmidt*, 172 Colo. 285, 473 P.2d 698, 700 (Colo. 1970)); "narcotics consisting of dangerous drugs, heroin and marijuana, together with paraphernalia, instrumental in the use of said contraband" (*People* v. *Walker*, 250 Cal.App.2d 214, 58 Cal.Rptr. 495, 499 (2nd Dist.)); "any and all controlled substances which may be kept there contrary to law" (*State* v. *Quintana*, 87 N.M. 414, 534 P.2d 1126, 1130 (1975)); "narcotics, dangerous drugs and narcotic paraphernalia" (*People* v. *Henry*, 482 P.2d 357, 361 (Colo. 1971)); "any and all substances controlled by SDCL 39-17," where the cited statutory section listed four schedules of illegal drugs

(*State* v. *Clark*, 281 N.W.2d 412, 416 (S.D. 1979)); property "in violation of the criminal laws of the State of New Jersey, more particularly those relating to the New Jersey Controlled Dangerous Substance Act, specifically 24:21-20(a1) and 24:21-20(a4)" (*State* v. *Christow*, 147 N.J.Super. 258, 371 A.2d 108, 109 (1977)).

Under any of the above-cited decisions the validity of the instant warrant must have been upheld, since a command to seize "evidence of the offense of cannabis, Possession of Controlled Substance and paraphernalia" is equivalent to one to seize cannabis, controlled substances, and related paraphernalia. The prefatory language concerning "the following instrument, articles and things" is mere surplusage, not affecting the particularity of the description. Its absence would presumably remove any doubt concerning the validity of the warrant. Its presence, therefore, would not logically invalidate the warrant, where it in no way widens the scope of the search authorized by the warrant.

While it is true that the language of the warrant was somewhat ineptly drafted, it, together with the Complaint for Search Warrant, met the test of leaving no discretion to the officer conducting the search, since only contraband of a particular sort fell within the ambit of the warrant. The Complaint on which the search warrant was issued specifically indicated that the informant had observed at the place to be searched "a quantity of Cannabis, weighing approximately five pounds . . . and a quantity of Controlled Substance, particularly methylenedioxy amphetamine, commonly known as MDA." See Complaint attached as Appendix C. Therefore, the search warrant, when combined with the complaint for the search warrant, provides a specific description of the items to be seized. *People* v. *Redmond*, 43 Ill. App.3d 682, 357 N.E.2d 204, 205 2 Ill. Dec. 227, 228 (1st Dist. 1976)

The instant search warrant thus bore no resemblance to the "general warrants" to which the Appellate Court compared it.

Moreover, the hyper-technical reading of the warrant by the Appellate Court is at variance with decisions of this Court holding that, due to the preference for warrants, a search pursuant to a warrant will be upheld in doubtful cases, and that evidence will not be suppressed for minor or technical irregularities not affecting substantial rights. See, e.g., *United States* v. *Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 744 13 L.Ed.2d 684 (1965).

The opinion of the Appellate Court is in conflict with decisions of this Court, has introduced confusion into an area of law that was formerly settled, and created a split in authority among various jurisdictions on a fundamental question of Federal Constitutional Law.

II. EXCLUSION OF EVIDENCE SEIZED ON PROBABLE CAUSE BUT PURSUANT TO AN INVALID SEARCH WARRANT IS UNJUSTIFIABLE, WHERE THE ALLEGED CONSTITUTIONAL VIOLATION CONSISTED OF JUDICIAL ERROR RATHER THAN ANY POLICE MISCONDUCT, SINCE EXCLUSION IN SUCH A CASE WOULD HAVE NO DETERRENT EFFECT.

This Court has repeatedly held that the Fourth Amendment and the "exclusionary rule" made applicable to the states by this court's decision in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), are not co-extensive. The "exclusionary rule" is not itself a part of the Fourth Amendment, but rather is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414, U.S. 338, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The exclusionary rule is therefore confined in its application to those areas where it will effectively serve its remedial objective; that being the deterrence of future unlawful police conduct. *Calandra*, 94

S.Ct. at 619-20; *Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960).

For this reason, this Court has declined to require exclusion of evidence in situations where such exclusion would have no significant deterrent effect, even though there may have been a serious violation of the Fourth Amendment by investigating officers. Accordingly, in *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 3051-52, 49 L.Ed.2d 1067 (1976), this Court held that claims of Fourth Amendment violations could not be raised in Federal *habeas corpus* proceedings, where the petitioner had been afforded a fair opportunity to litigate those claims in state court, since the incremental deterrent effect of applying the exclusionary rule in *habeas corpus* proceedings would be too small to justify the social costs involved in freeing an indubitably guilty prisoner. Similarly, in *United States* v. *Calandra*, 414, U.S. 338, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974), this court upheld the admissibility in grand jury proceedings of evidence illegally seized, finding that the potential damage to the functions of the Grand Jury resulting from exclusion outweighed any incremental deterrent effect on police misconduct. This Court applied a similar analysis in *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1967), in holding that an accused defendant could not object to the admission of evidence seized in violation of the Fourth Amendment rights of another. Again, this Court found the additional deterrent effect of extending the exclusionary rule to such a case insufficient to justify further encroachment on the public interest in having those accused of crime convicted or acquitted on the basis of all the evidence which exposes the truth. 89 S.Ct. at 967.

The instant cause presents even a stronger case for foregoing the exclusionary sanction. Although even in *Stone*, *Calandra*, and *Alderman*, police misconduct was presumed to have been present and it was acknowledged that some marginal

deterrent effect would have resulted from exclusion, the instant cause involves no police misconduct, and exclusion would therefore serve no deterrent function whatever. The conduct of the investigating officer was unexceptionable. He gathered evidence in a conscientious and lawful manner, prepared a complaint to the best of his ability, went to an impartial magistrate (A Judge of the Circuit Court of Saline County, Illinois), and laid his information before him for a determination of probable cause. The search was conducted in reliance on the magistrate's finding, and pursuant to the warrant issued by him. (Although the investigating officers seized certain items not described in the warrant, along with cannabis and controlled substances, the reason for seizure of these items does not appear of record and their seizure was not a subject of litigation in either the trial court or the appellate court.) The error, if any, was on the part of the magistrate, not the investigating officers or the prosecuting authorities. Suppression of evidence in such a situation can have no deterrent effect at all.

On the contrary, as this Court noted in *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 3051, 49 L.Ed. 2d 1067 (1976), indiscriminate application of the exclusionary rule may well have the opposite effect of generating disrespect for the law. To penalize police authorities who have conscientiously stayed within the bounds of the law in seeking a warrant, may well incite future police misconduct, by increasing the relative attractiveness of perjured testimony or the warrantless search.

The precise question here presented has not yet been directly addressed by this Court. The question is, however, of crucial importance to the administration of criminal justice, under the Constitution, and for this additional reason review by this Court is warranted.

CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that this Honorable Court issue its Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fifth District.

Respectfully submitted,

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APPENDIX

A

No. 78-399

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellant,* v. **DAVID BISHOP,** *Defendant-Appellee.*	Appeal from the Circuit Court of Saline County. — Honorable **ROBERT H. CHASE,** Judge Presiding.

MR. JUSTICE KUNCE delivered the opinion of the court:

The State appeals from an order entered by the Circuit Court of Saline County suppressing evidence seized pursuant to the following search warrant:

"* * *

TO ALL PEACE OFFICERS OF THE STATE OF ILLINOIS OR :

> . . . I therefore command that the person of David Bishop and a small single storied brownish gray sided dwelling house located in Saline County, approximately six-tenths of a mile north along the Bankston road, from its intersection with Illinois Route 13, approximately four and four-tenths mile west of the City of Harrisburg, Saline County, Illinois, said dwelling being the eleventh house facing the Bankston road on the east side, and a brown brick sided out building being located approximately twenty feet North and east of said dwelling house, and certain automobiles described as a blue Dodge Charger, approximately a 1970 or 1971; a blue and white panel truck, believed to be a GMC; and a late model Inter-

national Scout, and a green late model General Motors automobile, be searched and the following instrument, articles and things which have been used in the commission of, or which constitute evidence of, the offense of Possession of Cannabis, Possession of Controlled Substance and paraphernalia, be seized therefrom:

. . . (A four-line blank space followed before the language of the warrant continued).

I further command that a return of anything so seized shall be made without unnecessary delay before me or before any Judge or before any court of competent jurisdiction.

/s/ HARRY L. MCCABE
JUDGE"

No items were described in the blank space. The single issue raised in this appeal is whether this search warrant described the items to be seized with sufficient particularity.

It is the contention of the State that the failure of the search warrant to specify the items to be seized with language following the final colon is a technical irregularity and, as such, does not warrant suppression of evidence unless the defendant shows that substantial rights of his are adversely affected on account of this irregularity. The defendant, however, contends that this search warrant violates the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Constitution of Illinois which requires that "*** no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*" (Emphasis added.) Defendant also cites paragraph 108-7 of the Criminal Code (Ill. Rev. Stat. 1975, ch. 38, par. 108-7). That section speaks to search warrants and provides:

> "The warrant shall command the person directed to execute the same to search the place or person particularly described in the warrant and to seize the instruments, articles or things particularly described in the warrant."

We hold that the trial court properly suppressed evidence seized pursuant to this search warrant and correctly found that the search warrant "is defective, in that it does not specify the property to be seized ***." The absence of any language following the final colon in the search warrant results in a warrant providing *no description* at all of any article, item or thing. There can be no argument that the warrant sufficiently describes items to be seized when it fails to name or describe them *at all.*

We recognize that a generic description of the property to be seized is sufficient for a search warrant in some circumstances (*People* v. *Curry* (1973), 56 Ill. 2d 162, 306 N.E. 2d 292, 297) and that a warrant to seize narcotics unlawfully possessed need describe with particularity only the place where the drugs are concealed (*People* v. *Meadreds* (1961), 21 Ill. 2d 145, 171 N.E. 2d 638, 640). The problem, however, is that this search warrant's language, "the following instrument, articles and things which have been used in the commission of, or which constitute evidence of, the offense of Possession of Cannabis, Possession of Controlled Substance and paraphernalia ***:", is patently deficient because there are no words following the colon to name or identify, in any manner, the instrument, articles and things to be seized.

The constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded exactitude and cannot be left to guess, speculation or conjecture. General searches have never been condoned by our courts from the time they were known as writs of assistance under which officers of the Crown bedeviled the colonists. (*People* v. *Kimmel*, 34 Ill. 2d 578, 217 N.E. 2d 785). Where a search warrant is general in nature, it is an invitation to a sweeping and unlimited search and seizure. (*People* v. *Gillford* (4th Dist. 1974), 26 Ill. App. 3d 272, 325 N.E. 2d 81). The officers in the case before us apparently considered this warrant to be general as they seized, among other things, a telephone, a car stereo and a rifle.

It appears that there are no reported cases in Illinois concerning a search warrant which omits a listing of things to be seized. There are, however, federal cases and cases from other states which have considered search warrants suffering similar deficiencies. *Rice* v. *United States* (1st Cir. 1928), 24 F. 2d 479 involved charges of possession of opium without having registered and paid tax as required by the Harrison Narcotic Act and of concealing opium. The search warrant in *Rice* authorized the officer to enter the premises described and "*** there diligently to search and ascertain if any fraud upon the Internal Revenue has been or is being committed in or upon or by use of said premises." The trial court denied defendant's motion to quash the search warrant and defendant appealed from that order. The appellate court, reversing, found that "[i]n the warrant that was issued in this case there was no direction to seize any property, and consequently no description of the property to be seized ***" and held that "as the warrant in the present case was defective because of a failure to describe, *even in the most general way*, the property to be seized, the motion to quash it should have been granted." (24 F. 2d 480, 481). We believe, while the instant warrant and the warrant in *Rice* are not identical, they suffer from the same inadequacy, i.e., failure to state *what* property may be seized.

Giles v. *United States* (1st Cir. 1922), 284 F. 208 involved a charge of violation of the National Prohibition Act. The warrant in *Giles* recited a complaint alleging violations of the National Prohibition Act and proceeded as follows:

* * *

> You are therefore hereby commanded . . . to enter said premises in the day or night time, with the necessary and proper assistance, and there diligently to investigate and search into and concerning said violation, and to report and act concerning the same as required of you by law." (284 F. 2d 213).

The *Giles* court stated:

> "This language, requiring the officer 'to investigate and search into and concerning said violations,' is very far from being a direction to go to a particularly described place and there to seize particularly described property and to bring the same before a magistrate ***. While it may be argued that the requirement that the officer 'shall report and act concerning the same as required by law' is by implication a provision for a return, so as to relieve the warrant of one of the objections . . . the great weight of authority is that *the warrant should be specific and complete within itself.* The officer serving it should not be left to ascertain and judge of the requirements of the law." (Emphasis added.) (284 F. 2d 215).

There is, of course, the argument that the language in the warrant before us implies that the officer is to seize things which have been used in the commission of the stated offenses. Like the *Giles* court, however, we hold that such provisions are not to be implied. We are ever mindful that a search warrant which authorizes officials to enter a person's home at any time of the day or night for the purpose of taking possession of outlawed articles is a power capable of oppressive use. For this reason, the judiciary must asure its careful exercise by requiring, among other things, a sufficient description of the objects to be seized.

For the foregoing reasons, the order of suppression of the Circuit Court of Saline County is affirmed.

AFFIRMED.

KASSERMAN and JONES, J.J., concur.

PUBLISH IN FULL.

APPENDIX

B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
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(217) 782-2035

October 1, 1979

State's Attorneys Appellate
Service Commission
Fifth Judicial District
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No. 52126 —People State of Illinois, petitioner, vs. David Bishop, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX
C

**IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
SALINE COUNTY, ILLINOIS**

COMPLAINT FOR A SEARCH WARRANT

Jon L. Sandusky, complainant, now appears before the undersigned Judge of the Circuit Court of said County and requests the issuance of a search warrant to search the person of David Bishop and a small single storied brownish gray sided dewlling house located in Saline County, approximately six-tenths of a mile north along the Bankston road, from its intersection with Illinois Route 13, approximately four and four-tenths mile west of the City of Harrisburg, Saline County, Illinois, said dwelling being the eleventh house facing the Bankston road on the east side, and a brown, brick-sided out building being located approximately twenty feet north and east of said dwelling house, and certain automobiles described as a blue Dodge Charger, approximately a 1970 or 1971; a blue and white panel truck, believed to be a GMC; a green late model General Motors automobile, and a late model International Scout, and seize the following instruments, articles and things which have been used in the commission of, or which constitute evidence of, the offense of Possession of Cannabis, Possession of Controlled Substance and paraphernalia, in violation of Chapter 56½, Section 704; Chapter 56½, Section 1402; and Chapter 38, Section 22 of Illinois Revised Statutes, 1975.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and premises set forth above.

I, Jon L. Sandusky, being an agent of the Illinois Bureau of Investigation, Marion R.A., have received information from a reliable source that has given reliable information in the past

which I know to be true and reliable. Due to the fact it has led to the felony arrests of seven persons, conviction of one person and the pending felony arrests of four other persons in regard to the seizure of approximately 25 pounds of Cannabis; seizure of various Controlled Substances and the purchase of approximately one-half pound of Cannabis, the purchase of various Controlled Substances.

Said informant has observed on this date, at the above-described premises, a quantity of Cannabis, weighing approximately five pounds, located in the bedroom(s), and a quantity of Controlled Substance, particularly methyllenedioxyamphetsmine, commonly known as MDA, located in the bedroom(s) in the above-described premises.

The informant knows what Cannabis, and MDA are, because of his prior involvement in drugs and drug traffic.

It is noted that because of the Cannabis and MDA, no notice is planned to be given at the execution of the Warrant herein executed, due to the fact surprise entry is necessary to prevent the destruction of the Cannabis and MDA and paraphernalia, which are on the premises.

/s/ JON L. SANDUSKY
Complainant

SIGNED AND SWORN to before me this 9th day of December, 1976.

/s/ HARRY L. MCCABE
JUDGE

IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
SALINE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
vs.
DAVID BISHOP,
Defendant.

SEARCH WARRANT

TO ALL PEACE OFFICERS OF THE STATE OF ILLINOIS
or :

ON THIS DAY, JON L. SANDUSKY, COMPLAINANT, HAS SUBSCRIBED and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause and I therefore command that the person of David Bishop and a small single storied brownish gray sided dwelling house located in Saline County, approximately six-tenths of a mile north along the Banston road, from its intersection with Illinois Route 13, approximately four and four-tenths mile west of the City of Harrisburg, Saline County, Illinois, said dwelling being the eleventh house facing the Bankston road on the east side, and a brown brick sided out building being located approximately twenty feet North and east of said dwelling house, and certain automobiles described as a blue Dodge Charger, approximately a 1970 or 1971; a blue and white panel truck, believed to be a GMC; and a late model International Scout, and a green late model General Motors automobile, be searched and the following instrument, articles and things which have been used in the commission of, or which constitute evidence of, the offense of Possession of Cannabis, Possession of Controlled Substance and paraphernalia, be seized therefrom:

I further command that a return of anything so seized shall be made without unnecessary delay before me or before any Judge or before any court of competent jurisdiction.

/s/ HARRY L. MCCABE
JUDGE

DATE OF ISSUANCE 12-9-76

TIME OF ISSUANCE 5:20 p.m.

RETURNED NOT EXECUTED

I did execute this warrant within 96 hours from the time of issuance and it is hereby returned to the court as served.

/s/ JON L. SANDUSKY
Officer

DATE RETURNED 12-10-76

TIME RETURNED 11:15 a.m.

Supreme Court, U. S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

NO. 79-1008

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ILLINOIS,

Petitioner,

VS.

DAVID BISHOP,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIFTH DISTRICT

Respectfully submitted,

T. R. MURPHY, JR.,
Law Offices of Watson and Murphy
1333 Locust Street
Eldorado, Illinois 62930

Attorney for Respondent.

CITATIONS

Cases	Page
Cramp v. *Board of Public Instruction,* 368 U.S. 278 278,	5
Fox Film Corp. v. *Miller,* 296 U.S. 207	5
Herb v. *Pitcairn,* 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945)	4
Jankovich v. *Indiana Toll Road Comm.* 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965)	5,6
Oregon v. *Hass,* 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975)	6
State v. *Florance,* —Ore.—, 527 P. 2d 1202 (1974)	6

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The Respondent, David Bishop, through his attorney, T. R. Murphy, Jr. of Law Offices of Watson and Murphy, respectfully requests the Honorable Court deny the Petition of the State of Illinois For a Writ of Certiorari to the Appellate Court of Illinois, Fifth District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, is reported at 71 Ill. App. 3d 52, 388 N.E. 2d 1144, 27 Ill. Dec. 181 (5th Dist. 1979).

The order of the Supreme Court of Illinois denying the State's petition for leave to appeal was entered October 1, 1979. This order was not reported.

JURISDICTION

Jurisdiction is asserted by the State of Illinois under 28 U.S.C. § 1257 (3). The State contends that the relevant time limitations have been complied with and that the Court has jurisdiction because of the respondent's assertion of rights under the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to hear this case due to the fact that the opinions below were based upon constitutional and statutory provisions of the State of Illinois, as well as on provisions of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED
UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

CONSTITUTION OF ILLINOIS, 1970
ARTICLE I, Section 6

The People shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable search, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

Illinois Criminal Code, paragraph 108-7 (Ill. Rev. Stat., 1977, Ch. 38, par. 108-7).

The warrant shall command the person directed to execute the same to search the place or person particularly described in the warrant and to seize the instruments, articles or things particularly described in the warrant.

STATEMENT OF THE CASE

The statement of the case contained in Petitioner's brief appears to be correct in the particulars therein set forth.

REASONS FOR DISALLOWANCE OF WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CASE BECAUSE THE OPINIONS OF THE ILLINOIS COURTS BELOW WERE BASED UPON CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF ILLINOIS AS WELL AS ON SIMILAR PROVISIONS OF THE UNITED STATES CONSTITUTION.

The jurisdictional requirements of 28 U.S.C. § 1257 (3) have long been interpreted by this Court as not being met where the judgment of the State Court in question rests upon adequate and independent state grounds. The logic behind this limitation is well expressed by Justice Jackson speaking for the Court in *Herb* v. *Pitcairn*, 324 U.S., 117, 125-126, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945) as follows:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power to correct wrong judgments, not to revise opinions. We are not permitted to render advisory opinion, and if the judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory

opinion.

An examination of the opinion of the Appellate Court of Illinois, Fifth District, reveals that it was not based solely on the federal constitutional protections but was also founded on independent and adequate state statute and constitutional provisions.

This principle was applied by this Court in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965), wherein a Petition for Writ of Certiorari was dismissed as improvidently granted. In *Jankovich*, the Court cited *Fox Film Corp.* v. *Miller*, 296 U.S. 207, 210, and *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281, for the proposition that "...the settled rule that where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." In *Jankovich*, the opinion of the Indiana Supreme Court in question was based upon the Indiana Constitution as well as the 14th Amendment to the U. S. Constitution. Since the state ground was at least an equal ground of the decision, the Writ was dismissed, even though the Indiana Supreme Court had not separately analyzed the federal and non-federal grounds. Applying the principles of *Jankovich* to the instant case requires that the Court find it has no jurisdiction because of the reliance by the courts below on Illinois law.

A recent case decided by this Court deals with a situation in which the rights of a defendant in a criminal prosecution are protected by state as well as federal provisions. In *Oregon* v. *Hass*, 420 U.S. 714, 719 95 S. Ct. 1215, 43 L. Ed. 2d 570, 575, (1975), Justice Blackman, speaking for the majority in a footnote, cites with approval an Oregon case dealing with search and seizure in which the Oregon court states that it could interpret

its constitution as being more restrictive than the Fourth Amendment to the United States Constitution, *State* v. *Florance*, - - - Ore. - - -, 527 P. 2d 1202, 1208 (1974). Justice Blackman therein comments that the statement of the Oregon court is, of course, good law. If that statement of the Justice is indeed good law, then this Court has no alternative but to decide that it lacks jurisdiction to pass upon the interpretation of Illinois law by Illinois courts.

It is also worthy of note, that unlike *Hass*, in which this Court found no reliance on independent state grounds by the Oregon court, the decision in the instant case specifically cites the relevant Illinois law.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court enter an Order denying its Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Fifth District.

Respectfully submitted,

T. R. MURPHY, JR.,
Law Offices of Watson and Murphy
1333 Locust Street
Eldorado, Illinois 62930

Attorney for Respondent.